Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Magnavox Electronic Systems Company

File: B-258037; B-258037.2

Date: December 3, 1994

Alfred J. Verdi, Esq., Magnavox Electronic Systems Company; David A. Gerber, Esq., and Jonathan Fraser Light, Esq., Nordman, Cormany, Hair & Compton; William J. Spriggs, Esq., and Catherine R. Baumer, Esq., Spriggs & Hollingsworth; and Walter G. Birkel, Esq., and Eric L. Lipman, Esq., Griffin, Birkel & Murphy, for the protester.
Alan R. Yuspeh, Esq., Jerone C. Cecelic, Esq., and Ronald B. Vogt, Esq., Howrey & Simon, for Rockwell International Corporation, an interested party.
Gregory H. Petkoff, Esq., and Wayne A. Warner, Esq., Department of the Air Force, for the agency.
Daniel I. Gordon, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency reasonably justified "bundling" of a guidance system and the missile it serves in one procurement based on the need for complete integration of the overall system and the risk to the reliability of the missile if the guidance component were separately procured.

DECISION

Magnavox Electronic Systems Company protests the decision of the Department of the Air Force to procure mid-course guidance systems for certain missiles on a sole-source basis through modifications to contracts F08635-91-C-0069 and F08626-93-C-0011, previously awarded by the Air Force to Rockwell International Corporation.

We deny the protest.

The two contracts at issue concern the AGM-130 missile, a guided bomb that includes a rocket propulsion system. The AGM-130 was developed by Rockwell under a prior contract; these two contracts include developmental work as well as the actual manufacture of various lots of missiles. The focus of the dispute here is the procurement of a mid-course

guidance system to steer the missile between the time of initial release by the delivery aircraft and the time at which visual contact with the target is established.

The protester was aware of the Air Force's need for a mid-course guidance system for the AGM-130 missiles as a result of the firm's performance of a contract involving another aspect of the AGM-130 effort. At its own initiative, Magnavox provided the agency with a "white paper" in November 1992, followed by a January 13, 1993 briefing, on an approach that Magnavox proposed for the mid-course guidance system. The Air Force had concerns about both technical and cost aspects of the Magnavox approach, notwithstanding the protester's representation that its approach was technologically superior and likely to produce significant cost savings for the Air Force.

Shortly after Magnavox's briefing, and prior to the Air Force's reaching a formal determination about the practicality of that firm's approach, the Air Force issued a notice in the Commerce Business Daily (CBD) on January 19, 1993, stating that the agency anticipated awarding a "sole-source contract [to] Rockwell International Corporation . . . to integrate mid-course guidance capability into the AGM 130 Weapon System." The notice stated that "[o]nly [Rockwell] is sufficiently familiar with the AGM 130 Weapon System to successfully design and integrate mid-course guidance capability into the production baseline without a validated reprocurement package." The notice further stated that "adequate reprocurement data is not available and the substantial duplication of cost to the government which is likely to result from development of a new source is not expected to be recovered through competition." The notice included Note 22, stating that any responsible source could submit a statement of capability, which would be considered.

Neither Magnavox nor any other firm submitted a statement of capability or otherwise responded to the CBD notice.[1] The Air Force therefore proceeded with plans to have Rockwell perform the work related to the AGM-130 mid-course guidance system. Although the agency initially intended to issue a

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[1]Although Magnavox's initial protest asserted that the firm had responded to the CBD notice, the Air Force's report to our Office denied having received a response from Magnavox. Magnavox did not reply to the agency report in this respect, nor did its initial protest provide any evidence of having responded to the CBD notice (or details such as the date of the response, the name of the sender or recipient, or a description of the response's contents). On this record, we conclude that Magnavox did not respond to the CBD notice.

new contract to cover that work, it determined in February 1993 that the work was within the scope of the AGM-130 contract, No. F08635-91-C-0069, which had already been awarded to Rockwell and that no new contract was needed. Accordingly, the existing contract was modified in April 1993 to include the mid-course guidance work. In August 1993, the justification and approval that had been previously documented for the sole-source procurement of the AGM-130 system from Rockwell was modified to incorporate the addition of the mid-course guidance system, as well as other changes, such as a reduction in the number of missiles to be acquired from 4,048 to 2,300.[2]

In September 1993, the Air Force awarded contract No. F08626-93-C-0011 to Rockwell and published notice of the award in the CBD. That contract covered manufacture of the quantity of AGM-130 missiles referred to as "Lot 4." Lot 5 was included in the contract as an option quantity.

Magnavox was aware, through its participation in an interface control working group established to coordinate the various aspects of the AGM-130 program, that the Air Force had decided against pursuing the firm's alternative approach. In May 1994, however, Magnavox approached the Air Force in an effort to persuade the agency to "revisit" its decision to have Rockwell perform the mid-course guidance system work. Magnavox argued that the reduction in the number of missiles being procured would result in Magnavox's approach being significantly less costly than Rockwell's, while also causing less disruption to the program schedule. The Air Force was not persuaded, and it so advised Magnavox in a July 8 letter rejecting the firm's approach both because the cost savings were overstated and because of concerns about "program executability" if Magnavox were to do the mid-course guidance work while Rockwell performed the bulk of the AGM-130 work.

On July 14, the Air Force exercised the option for the Lot 5 quantity by issuing a modification to Rockwell's contract; notice of the modification was published in the CBD on July 20. On July 29, the contract was further modified to add the mid-course guidance system to the Lot 5 work.

On July 29, Magnavox filed a protest with our Office alleging that the Air Force had failed to publish its requirement for the mid-course guidance system for the AGM-130 in the CBD and was acquiring that system without full and open competition. Magnavox also argued that the

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[2]In September 1993, a decision was reached to reduce the number of missiles being acquired to 502, and that quantity was reduced to 400 in June 1994.

agency was improperly "bundling" the mid-course guidance system with other AGM-130 work. At the time it filed its initial protest, Magnavox apparently did not realize that the July 14 action was limited to the exercise of an option. Upon learning that, the firm filed a supplemental protest on August 19 contending that the option was not exercised properly. Magnavox did not specifically protest the July 29 contract modification adding the mid-course guidance system to Rockwell's contract.

Before considering the substance of the protest, we address the question of the admission of one of Magnavox's attorneys to the protective order issued by our Office in this protest. After consideration of the application of that attorney, who is in-house counsel at Magnavox, and the opposition to the application, as well as a further submission by Magnavox, we concluded that, due to a number of specific factual circumstances, there was an unacceptable risk of inadvertent disclosure of protected information, and we denied the application. Our Office did admit a number of other attorneys on behalf of Magnavox to the protective order, including attorneys from multiple law firms.

We examine any application for admission to a protective order individually in order to determine whether the applicant is involved in competitive decision-making or there is otherwise an unacceptable risk of inadvertent disclosure of the protected material. Applicants are neither automatically admitted because they are outside counsel nor automatically denied access because they are in-house counsel; that is, consistent with the holding in U.S. Steel Corp. v. United States, 730 F.2d 1465 (Fed. Cir. 1984), our Office has no per se rule in this regard.

Instead, in reviewing each application, our Office considers the entire factual context, including the applicant's responsibilities and activities (for example, whether the applicant reviews bids or proposals), the physical layout of the facility where protected material may be placed, the nature and sensitivity of the material sought to be protected, and the presence (or absence) of opposition expressing legitimate concerns that the admission of the applicant would pose an unacceptable risk of inadvertent disclosure. See Earle Palmer Brown Cos., Inc., 70 Comp. Gen. 667 (1991), 91-2 CPD ¶ 134; Bendix Field Eng'g Corp., B-246236, Feb. 25, 1992, 92-1 CPD ¶ 227. Cf. Matsushita Elec. Indus. Co., Ltd. v. United States, 929 F.2d 1577 (Fed. Cir. 1991); U.S. Steel Corp. v. United States, supra.

On the basis of such an assessment, we denied the application for access of Magnavox's in-house counsel. That applicant, whose admission was opposed by Rockwell, disclosed in his submissions that he is the only in-house

attorney providing legal support to the Magnavox facility involved in this procurement; his office is located in the suite of executive offices at that facility; and he reports directly to a corporate officer (the Senior Vice President and General Manager). He also disclosed that he is "involve[d] with the technical data" in conjunction with providing legal advice with respect to proprietary disclosure agreements, teaming agreements, licenses, and export matters; and he reviews "non-routine proposals."

Magnavox's supplemental submission clarified its earlier representations in ways suggesting that its in-house counsel's role is narrowly defined. The applicant explained that, with respect to proprietary disclosure agreements, teaming agreements, licenses, and export matters, he merely reviews documents "in the abstract," for "proper wording, boiler plate legal requirements, such as conflict of law clauses and the like, and compatibility of those contract provisions with relevant legal requirements." Similarly, the applicant explained his earlier statement that he reviews "non-routine proposals" by stating that "the focus of [my] advice is the proper interpretation of solicitation clauses" and "their applicability to [Magnavox's] standard commercial product marketing procedures or whether circumstances giving rise to potential bid protests exist"; i.e., the review only of clauses in public solicitations. We found these supplemental representations unconvincing because they were substantially in conflict with the applicant's initial representations.

Concerning his position as the only in-house attorney and his reporting directly to a corporate officer at his facility, the applicant "clarified" his affidavit by stating that legal advice is provided by attorneys at another Magnavox facility in his absence or where advice is needed in a specialized area, such as environmental law. This clarification did not eliminate our Office's concern in this regard. The fact that his client turns to another attorney only when he is away or when a legal issue arises for which a specialist is needed underscored the applicant's position as the attorney of first resort for the facility in which he works.[3]

In sum, the applicant's submissions established that his position and job responsibilities are such that he routinely provides advice and assistance to his company's competitive strategists regarding competition-sensitive matters. If the

[3]Similarly, the applicant's statement that he is "accountable" to Magnavox's general counsel at another site, in addition to his reporting to a corporate officer at his facility, did not reduce the risk of inadvertent disclosure.

applicant were given access to a competitor's proprietary information, he would need to be continuously aware of and to mentally compartmentalize the potentially relevant information he now possessed that would be nondisclosable to his Magnavox colleagues. Accordingly, on the basis of the entire record before us, our Office was unable to conclude that the risk of inadvertent disclosure of protected material was sufficiently small to warrant his admission to the protective order. Consequently, the application was denied.[4]

In its report to our Office, the Air Force presented evidence that it had published in the CBD its requirement for the mid-course guidance system for the AGM-130 and its intention to award that work to Rockwell without competition. In its comments on the agency report, the protester failed to address these issues. Accordingly, we view Magnavox as having abandoned its allegation that the agency did not provide notice of its intended action in the CBD.[5] See Hampton Rds. Leasing, Inc., 71 Comp. Gen. 90, (1991), 91-2 CPD ¶ 490.

As noted above, Magnavox has not rebutted the agency's contention that the protester did not respond to the January 19, 1993, CBD notice. Where a CBD notice concerning intent to award a sole-source contract includes Note 22 giving potential sources 45 days to submit expressions of interest showing their ability to meet the agency's stated requirements, a protester must respond to the CBD notice with a timely expression of interest in fulfilling the agency's requirement and must receive a negative agency response as a prerequisite to filing a protest challenging an agency's sole-source decision. Norden Sys., Inc., B-245684, Jan. 7, 1992, 92-1 CPD ¶ 32. This procedure gives the agency an opportunity to reconsider its sole-source decision in light of a serious offeror's preliminary proposal, while limiting challenges to the agency's sole-source decision to diligent potential offerors.

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[4]Magnavox filed suit in the United States District Court for the District of Columbia, where it sought to have the court direct our Office to admit its in-house counsel to the protective order. Civil Action No. 94-1999. The court denied Magnavox's motions for a temporary restraining order and a preliminary injunction, and granted our Office's motion for summary judgment.

[5]Similarly, we consider Magnavox to have abandoned its allegation that the option was not exercised properly on July 14, 1994, because the protester failed to comment on the agency report on this issue.

Fraser-Volpe Corp., B-240499; et al., Nov. 14, 1990, 90-2 CPD ¶ 397. Because Magnavox failed to respond to the January 19 CBD notice, our Office normally would not consider the merits of its protest of the decision to have Rockwell perform the mid-course guidance work on a sole-source basis.[6] However, in view of Magnavox's expression of interest immediately prior to the CBD notice, as well as the lack of formal notification by the Air Force until July 1994 that Magnavox's approach had been rejected, we will address the merits here.

While the Air Force offers a number of justifications for procuring the mid-course guidance system on a sole-source basis from Rockwell, the question of "bundling" is dispositive. If the agency reasonably found that it needed to have the manufacturer of the AGM-130 missiles supply the mid-course guidance system as well, it could limit the procurement to Rockwell even if Magnavox were able to manufacture the mid-course guidance system (a subject of considerable dispute in this protest). Magnavox challenges the Air Force's decision to "bundle" the mid-course guidance system with other AGM-130 work.

Our Office recognizes that bundled procurements, which combine multiple requirements into one contract, have the potential for restricting competition by excluding firms that can only furnish a portion of the requirement, and we review challenges to such solicitations to determine whether the approach is reasonably required to satisfy the agency's minimum needs. See National Customer Eng'g, 72 Comp. Gen. 132 (1993), 93-1 CPD ¶ 225. We uphold the bundling of requirements only where agencies have provided a reasonable basis for using such an approach. See, e.g., LaQue Center for Corrosion Technology, Inc., B-245296, Dec. 23, 1991, 91-2 CPD ¶ 577.

Here, the agency has offered a reasonable basis for bundling its requirements for the AGM-130 missile and their mid-course guidance system. In response to the protester's contention that some component systems of the AGM-130 have been separately competed, the agency points out that, while other subsystems were procured separately wherever possible, separate procurement of the guidance system would create undue risk, since integration of the guidance system is critical to the accurate functioning of the missile. The

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[6]We also note that Magnavox did not protest, either in its initial protest or the August 19 supplemental submission, the July 29 contract modification adding the mid-course guidance system to Rockwell's contract, nor did it protest the April 1993 modification of contract No. F08635-91-C-0069 adding the mid-course guidance work to that contract.

agency views the mid-course guidance system as a nonseverable part of the AGM-130 missile system because of the central role that the mid-course guidance mechanism plays in ensuring that the target will be in the field of view once the missile is close enough for visual contact to be established. Accordingly, the Air Force advises that the reliability of the entire system would be called into question if the guidance system were separately procured. We view the need to reduce risk of the failure of an integrated weapons system as a reasonable basis for using a consolidated procurement, as the Air Force has done here. See Titan Dynamics Simulations, Inc., B-257559, Oct. 13, 1994, 94-2 CPD ¶ 139.

Magnavox insists that its approach would lead to cost savings, particularly in light of the reduced quantities of missiles being procured, and that the agency should not have integrated the mid-course guidance work into Lot 5, but has not rebutted the agency's documentation that separate procurement of the guidance system would create undue risk. While Magnavox plainly disagrees with the agency's assessment of risk, the record provides no basis to conclude that the agency's assessment in this area is unreasonable.

The protest is denied.

for Paul Lieberman
Robert P. Murphy
Acting General Counsel